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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

Crafty Production, Inc., a California
corporation, and Crafty Productions, LLC,
a California company,

Plaintiffs,

vs.

Fuqing Sanxing Crafts, Co., Ltd., a China
company, Tony Zhu, an Individual, MRF
Associates, Inc., a Massachusetts
corporation, Michelle Faherty, an
Individual, The Michaels Companies,
Inc., a Delaware corporation, Michaels
Stores, Inc., a Delaware corporation, Plaid
Enterprises, Inc., a Georgia corporation,
Hobby Lobby, Inc., an Oklahoma
corporation, Sbars, Inc., a New Jersey
corporation, A.C. Moore Arts & Crafts,
Inc., a New Jersey corporation, 99 Cents
Only Stores, Inc., a California
corporation, Dollar Tree, Inc., a Virginia
corporation, Jo-Ann Stores, LLC, an Ohio
company, Party City Holdings, Inc., a
Delaware corporation, Party City
Corporation, a Delaware corporation,
ZheJiang HongYe Co., Ltd., a China
company, Fuzhou Bomy Trading Co.,
Ltd., a China company, Fuzhou Great
Suns Co., Ltd., a China Company,
Sunface Crafts Co., Ltd, a China
company,

Defendants.

Case No. 15CV0719 BAS JLB

**THE MICHAELS COMPANIES, INC.,
MICHAELS STORES, INC., AND
HOBBY LOBBY, INC.'S
MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS PURSUANT
TO FED.R.CIV.P. 8 & 12(B)(6) AND
FOR A MORE DEFINITE
STATEMENT PURSUANT TO
FED.R.CIV.P. 12(E)**

Hearing

Date: October 5, 2015
Courtroom: 4B
Judge: Hon. Cynthia Bashant

**NO ORAL ARGUMENT UNLESS
REQUESTED BY THE**

COURT

1 The Michaels Companies, Inc., Michaels Stores, Inc. (collectively “Michaels”) and Defendant Hobby Lobby, Inc.¹ (“Hobby Lobby”) hereby submit the following
2 memorandum in support of their Motion to Dismiss and Motion for a More Definite
3 Statement pursuant to Federal Rules of Civil Procedure 12(b)(6) and 12(e), and
4 would respectively show:
5

6 **I. SUMMARY OF ARGUMENT**

7 The Complaint should be dismissed because it fails to provide Michaels and
8 Hobby Lobby fair notice of the claims asserted against them. On April 1, 2015,
9 Plaintiffs Crafty Productions, Inc. (“CPI”) and Crafty Productions, LLC (“CPL”) (collectively, “Plaintiffs”), filed suit against Michaels and Hobby Lobby and 16 other
10 unrelated defendants for infringement of fifty one (51) copyrights, federal and state
11 trade dress infringement, intentional interference with prospective economic
12 advantage, and unfair competition laws. After reciting sixteen (16) pages of factual
13 allegations, the vast majority of which has nothing to do with Michaels or Hobby
14 Lobby, the Complaint sets forth eight (8) causes of action. For each of the five (5)
15 claims asserted against all defendants (including Michaels and Hobby Lobby), the
16 Complaint incorporates by reference all sixteen (16) pages of facts and then recites
17 the elements of each claim. Plaintiffs make no effort to distinguish which facts apply
18 to which defendant. Plaintiffs make no effort to identify which works Michaels or
19 Hobby Lobby allegedly infringed. Plaintiffs make no effort to identify their trade
20 dress. Plaintiffs make no effort to identify which prospective business Michaels or
21 Hobby Lobby interfered with or how. Plaintiffs make no effort to identify how
22 Michaels or Hobby Lobby is competing unfairly. The Complaint is merely an
23 impermissible “shotgun pleading” that fails to provide Michaels and Hobby Lobby
24 fair notice of the claims asserted against them and, for this reason alone, should be
25 dismissed. Plaintiffs’ claims should also be dismissed for the following reasons:
26

27 ¹ The Complaint names and refers to “Hobby Lobby, Inc.” However, the
28 correct name of this defendant is “Hobby Lobby Stores, Inc.”

Copyright Infringement (Claim for Relief 1):

First, filing of a valid registration is a prerequisite to filing a suit for infringement. CPI's copyright "registrations" are invalid because it is not the owner of the works. Second, the Complaint fails to identify which of the fifty one (51) copyrights Michaels or Hobby Lobby allegedly infringed. Third, the Complaint fails to identify the constituent elements of its works that are "original" and allegedly copied by Michaels or Hobby Lobby. Fourth, Plaintiffs' prayer for statutory damages and attorneys' fees is barred because Plaintiffs failed to file any valid copyright registrations within three months after the first publication of the work.

False Designation of Origin (Claims for Relief 2 & 3):

First, Plaintiffs' trade dress claims must be dismissed because the Complaint does not identify the trade dress Michaels or Hobby Lobby allegedly infringed. Second, the trade dress claims must be dismissed because the Complaint fails to allege which products, if any, have acquired protectability.

State-law claims (Claims for Relief 4 & 5):

First, Plaintiffs' intentional interference with prospective economic advantage and unfair competition claims are preempted by the Copyright Act and, therefore, must be dismissed. All of the allegations against Michaels and Hobby Lobby fall within the categories of copying, distributing, and creating derivative works of copyrighted material, and Plaintiffs have done nothing more than restate their copyright claims as state-law claims.

Intentional Interference (Claim for Relief 4):

Plaintiffs' interference claim also fails because Michaels and Hobby Lobby are not a "stranger" to their economic relationship with Plaintiffs and cannot interfere with their own relationship. To the extent that Plaintiffs are alleging Michaels or Hobby Lobby interfered with other relationships, the claim still fails because Plaintiffs have failed to plead any facts to support such an allegation. Plaintiffs have

1 not identified any specific relationships Michaels or Hobby Lobby allegedly
2 interfered with to Plaintiffs' detriment.

3 **Alternatively, More Definite Statement (Claims for Relief 1-5):**

4 In the alternative, Michaels and Hobby Lobby moves for a more definite
5 statement because the allegations against Michaels and Hobby Lobby are vague and
6 ambiguous, and, more importantly, fail to provide fair notice. Michaels and Hobby
7 Lobby have a right to know what is claimed against them, Plaintiffs should provide a
8 more definite statement for any claims that are not dismissed.

9 **II. INTRODUCTION**

10 Plaintiffs have sued 19 unrelated defendants for a variety of claims under a
11 twisted, confusing, and, as it related to Michaels and Hobby Lobby, conclusory
12 complaint that lacks any factual support. For the most part, the Complaint focuses on
13 allegations regarding CPI's sales representative (Faherty and MRF Associates, Inc.),
14 CPI's business partner (Fuqing and Zhu), and certain Chinese manufacturing plants
15 (ZheJiang, Fuzhou Bomy, Fuzhou Great Suns, and Sunface). In short, the Complaint
16 alleges that CPI's sales representative, CPI's business partner, and the Chinese
17 manufacturing plants conspired, stole, and sold unknown and unidentified
18 copyrighted works in the marketplace.

19 As an almost afterthought, Plaintiffs also sued 11 retailers, including Michaels
20 and Hobby Lobby. The Complaint, however, lacks facts supporting any of the claims
21 against Michaels or Hobby Lobby. The totality of facts allegedly supporting the
22 claims against Michaels are as follows:

23
24 57. In October 2014, CPI offered to sell products factory direct
25 to Michaels. Michaels was buying very little from CPI, even after many
26 years of doing business with CPI and good relationships with Michaels
27 buyers such as Mike Loveless, Bruce Miller and others including Eric
28 Dickinson, who stated once that CPI's wood products "saved" Michaels'
wood department. CPI never sold Michaels wood alphabets, even though
CPI's wood alphabets have been sold at Michaels.

1 58. Michaels was very interested in buying factory direct from
2 CPI, and scheduled a meeting with 5 or 6 people including Girish Gulati,
3 Michaels' Manager of Global Sourcing, Ami Hutchings, and a few
4 others. This was very unusual to have this many people in a sales
5 presentation, especially since Michaels had not been interested in buying
6 CPI's seasonal products in recent years. At the meeting, Michaels was
very excited to legally sell CPI's products again because they were a
huge money maker for them.

7 59. When CPI asked Zhu for pricing, he gave higher prices than
8 what he gives CPI for other customers. In an e-mail, Zhu said, "can't
9 you try and sell to some smaller companies." On information and belief,
10 Zhu did not want CPI to know that he was trying to sell CPI's original
11 designs and products to Michaels through Faherty.

12 60. In a subsequently meeting, Michaels seemed very interested
13 to buy CPI's dollar wood products factory direct for Halloween, Fall and
14 other seasons for 2015. For years, Michaels has sold seasonally CPI's
15 masks, stand ups and many other products identical or substantially
16 similar to CPI's designs, including in paper, foam, felt or material other
17 than wood. Traditionally, wood products sell much better than these
18 other materials. On information and belief, Michaels has for years been
19 buying from Faherty these identical or substantially similar wood
20 seasonal products (including masks and stand ups), and other identical or
21 substantially similar products in different media other than wood, which
22 Faherty has been selling to Michaels using various factories including
23 the Hongye factory.

24 The totality of facts allegedly supporting the claims against Hobby Lobby are
25 as follows:

26 44. During the 2014 meeting between Faherty and Mello, Faherty
27 admitted that (a) she had sold CPI's wood products to the 99 Cents Only Store,
28 (b) she had sold CPI's products to Hobby Lobby, (c) she had sold CPI's
products to Jo-Ann's.

 61. In approximately September 2014, CPI offered Christmas,
Halloween, and fall items to Hobby Lobby, who picked out for Christmas 26
of the 50 samples, and approximately the same amount for fall and Halloween.
Hobby Lobby was excited CPI was showing them new designs and new
products for sale factory direct.

 62. Hobby Lobby requested the actual samples of 26 of the 50
products for Christmas and approximately the same amount for Fall and

1 Halloween. Ultimately, CPI asked for the samples back, but the Hobby Lobby
2 buyer Jessica Haynes claimed she did not have them anymore. On information
3 and belief, Faherty undercut CPI with Hobby Lobby like she did with Bill at
4 A.C. Moore. In fact, Faherty admitted that she worked with Hobby Lobby each
5 season to show them CPI's original wood products, so that they could adapt or
6 derive a slightly different design in an attempt to call it their "own" product.

7 Based on these sparse facts, Plaintiffs sued Michaels and Hobby Lobby for
8 infringement of fifty-one (51) copyrights, an unknown number of federal and state
9 trade dress infringement, intentional interference with prospective business, and
10 unfair competition. As shown below, the Complaint lacks the basic factual and legal
11 support to support these claims, and should be dismissed.

12 **III. ARGUMENT AND AUTHORITIES**

13 **A. EACH OF PLAINTIFFS' CLAIMS AGAINST MICHAELS AND FAILS 14 TO PLEAD FACTS SUFFICIENT TO GIVE RISE TO STATE A 15 CLAIM.**

16 A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) "tests the
17 legal sufficiency of a claim." *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001).
18 "A complaint may be dismissed under Rule 12(b)(6) for failure to state a claim if the
19 plaintiff fails to state a cognizable legal theory, or has not alleged sufficient facts to
20 support a cognizable legal theory." *Oracle Am., Inc. v. Service Key, LLC*, 2012 U.S.
21 Dist. LEXIS 171406 (N.D. Cal. 2012), *citing Balistreri v. Pacifica Police Dept.*, 901
22 F.2d 696, 699 (9th Cir. 1990). Courts "consider only allegations contained in the
23 pleadings, exhibits attached to the complaint, and matters properly subject to judicial
24 notice." *Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007). While the court
25 must "accept all factual allegations in the complaint as true and construe the
26 pleadings in the light most favorable to the nonmoving party," *Outdoor Media
27 Group, Inc. v. City of Beaumont*, 506 F.3d 895, 899-900 (9th Cir. 2007), a "pleading
28 that offers labels and conclusions or a formulaic recitation of the elements of a cause
of action will not do." *Ashcroft*, 556 U.S. at 678. The complaint must allege

1 “enough facts to state a claim to relief that is plausible on its face” and enough to
2 “raise a right to relief above the speculative level.” *Bell Atlantic Corp. v. Twombly*,
3 550 U.S. 544, 555, 570 (2007). That is, Plaintiff’s complaint must be both
4 “sufficiently detailed to give fair notice to the opposing party of the nature of the
5 claim so that the party may effectively defend against it” and “sufficiently plausible”
6 such that “it is not unfair to require the opposing party to be subjected to the expense
7 of discovery.” *Starr v. Baca*, 633 F.3d 1191, 1204 (9th Cir. 2011). “Threadbare
8 recitals of the elements of a cause of action, supported by mere conclusory
9 statements, do not suffice.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

10 **1. Plaintiffs’ “Shotgun Pleading” is Improper and Should be**
11 **Dismissed.**

12 The Complaint’s “shotgun pleading” fails to give Michaels and Hobby Lobby
13 fair notice of the facts supporting any claims alleged against it. In a multi-defendant
14 case, Rule 8 requires that the plaintiff give each defendant a clear statement about
15 what each defendant allegedly did wrong and does not allow for “shotgun pleading.”
16 Fed. R. Civ. P. 8(a); *Sollberger v. Wachovia Sec., LLC*, No. SACV 09-0766, 2010
17 WL 2674456, at *4 (C.D. Cal. June 30, 2010). Shotgun pleading occurs when “one
18 party pleads that multiple parties did an act, without identifying which party did what
19 specifically” or when “one party pleads multiple claims, and does not identify which
20 specific facts are allocated to which claim.” *Hughey v. Camacho*, No. 2:13-cv-2665,
21 2014 U.S. Dist. LEXIS 150756, at *9 (E.D. Cal. Oct. 23, 2014). Thus, specific
22 identification of the parties to the activities alleged is required in order for the
23 defendants to be able to respond intelligently. *Cataulin v. Wash. Mut. Bank*, No. 08
24 CV 2419, 2009 WL 648921, at *2 (S.D. Cal. Mar. 9, 2009). A complaint with
25 multiple parties that merely “incorporate each preceding paragraph, regardless of
26 relevancy, [is] not permitted.” *Destfino v. Kennedy*, No. CV-F-08-1269, 2009 WL
27 63566, at *4 (E.D. Cal. Jan 8, 2009). Confusion of which facts and claims apply to
28

1 which defendants requires that the complaint be dismissed. *Gen-Probe, Inc. v.*
2 *Amoco Corp.*, 926 F. Supp. 948, 961 (S.D. Cal. 1996).

3 Plaintiffs' Complaint should be dismissed as an improper shotgun pleading.
4 Plaintiffs' 16-page pleading is filled with factual allegations that span over 20 years,
5 relate to conduct in two different countries and eight different states, and, and shown
6 above, rarely even mentions Michaels or Hobby Lobby. PLAINTIFFS' COMPLAINT, at
7 ¶¶ 22-65. The shotgun pleading names 19 unrelated defendants (2 sales
8 representatives, 2 business partners, 4 Chinese manufactures, and 11 retailers). *Id.* at
9 ¶¶ 6-20. The Complaint asserts 8 claims for relief, 5 of which are asserted against all
10 19 defendants. *Id.* at ¶¶ 66-111. For each count against every defendant, Plaintiffs
11 incorporate all the recited facts, most of which are irrelevant to any conduct of
12 Michaels or Hobby Lobby, or specific count against Michaels or Hobby Lobby. *Id.*
13 at ¶¶ 66, 71, 79, 84, & 89. Plaintiffs then merely draw legal conclusions by reciting
14 the elements of each claim. *Id.* at ¶¶ 66-111. Not only are the general allegations
15 incorporated into each claim, but each claim is incorporated into all subsequent
16 claims. *Id.* at ¶¶ 66, 71, 79, 84, & 89. As a result, Michaels and Hobby Lobby are
17 left to guess what actions they took that amounted to a purported violation of
18 Plaintiffs' rights, which of its products allegedly infringe upon Plaintiffs' copyrights
19 and trade dress, what facts support the theories of liability against it, and which
20 allegations it must defend itself against. Such a complaint violates Rule 8 and should
21 be dismissed. *Mitchell v. Corr. Corp. of Am.*, No. 09cv1554, 2010 U.S. Dist. LEXIS
22 81965, at *24 (S.D. Cal. Aug. 6, 2010) (holding "a shotgun pleading in which an
23 avalanche of allegations are made, and then a snowball of claims that fail to state the
24 facts pertinent to each"); *Sollberger*, 2010 WL 2674456, at *4 (dismissing shotgun
25 pleading and admonishing use of the "omnibus term 'Defendants' throughout a
26 complaint by grouping defendants together without identifying what the particular
27 defendants specifically did wrong"); *Zinzuwadia v. Mortg. Elec. Reg. Sys., Inc.*, No.
28 2:12-cv-02281, 2012 WL 6737837, at *7 (E.D. Cal. Dec. 28, 2012) (dismissing

1 shotgun pleading that was “replete with allegations that the defendants engaged in
2 certain conduct, making no distinction among the [defendants] charged”); *Cataulin*,
3 2009 WL 648921, at *2 (dismissing shotgun pleading that “presents almost no facts
4 demonstrating any wrongs by particular defendants, but rather ascribes nearly all
5 allegations collectively to ‘Defendants’”); *Mason v. Cnty. of Orange*, 251 F.R.D. 562,
6 563 (C.D. Cal. 2008) (dismissing shotgun pleading because “unless cases are pled
7 clearly and precisely, issues are not joined, discovery is not controlled, the trial
8 court’s docket becomes unmanageable, the litigants suffer, and society loses
9 confidence in the court’s ability to administer justice”). Because Plaintiffs allege far
10 more facts than needed and state the claims in a formulaic manner by reciting their
11 respective elements and not much else, the complaint should be dismissed.

12 **2. Plaintiffs’ Copyright Infringement Claim Should be Dismissed**

13 **a Plaintiffs Have Not Met the Prerequisite in 17 U.S.C. § 411(a)**
14 **because CPL Did Not Register the Copyrights.**

15 Under the Copyright Act, “no civil action for infringement of the copyright in
16 any United States work shall be instituted until preregistration or registration of the
17 copyright claim has been made in accordance with this title.” 17 U.S.C. § 411(a).²
18 Section 408 of the Copyright Act provides that “the *owner* of copyright or of any
19 exclusive right in the work may obtain registration of the copyright claim.” 17
20 U.S.C. §408(a) (emphasis added). Thus, registration of a copyrighted work is a
21 prerequisite for bringing a civil action for copyright infringement. *See J&J Sports*
22 *Prods., Inc. v. Kigo*, No. 10-cv-05512, 2011 WL 341839, at *1 (N.D. Cal. Aug. 4,
23 2011). As shown below, the owner of the copyrights did not file for registration.

24 On March 1, 2014, CPL became the owner of the copyrights at issue when CPI
25 assigned ownership. PLAINTIFFS’ COMPLAINT, at Exhibit O at p 7 (noting that Crafty

26
27 ² The Ninth Circuit has held that “registration” occurs once the Copyright Office receives a
28 complete application. *Cosmetic Ideas, Inc. v. IAC/Interactivecorp.*, 606 F.3d 612, 621 (9th Cir. 2010).

Productions, Inc. had assigned ownership of all assets to Crafty Production, LLC) (Dkt. #1-16). Prior to that date, CPI had not filed any copyright registrations on the alleged works. Rather, as part of this lawsuit, CPI filed the 51 registrations and improperly claimed to be the owner. PLAINTIFFS' COMPLAINT, at ¶ 5 (Dkt. 1); see also Attachment B. (Dkt. 1-2). Because CPI was not the owner, the registrations are invalid. More importantly, because CPL, the owner of the copyrights, has not yet filed for registration, the prerequisite in 17 U.S.C. § 411(a) has not been met. *Ricketts v. Haah*, No. 2:13-cv-00521-ODW, 2013 WL 3242947, at *2 (C.D. Cal. June 26, 2013) ("In order to file a copyright-infringement suit, the copyright *owner* must first register or file an application to register his copyright.") (emphasis added). Consequently, the copyright infringement claim should be dismissed.

b. Plaintiffs' Complaint fails to identify the specific copyrighted works Michaels or Hobby Lobby allegedly infringed.

General allegations of infringing several copyright registrations leave a defendant without sufficient notice as to the substance of the claimed infringement. *See Salt Optics, Inc. v. Jand, Inc.*, No. SACV 10-0828 DOC, 2010 WL 4961702, at *6-7 (C.D. Cal. Nov. 19, 2010) (granting motion to dismiss copyright infringement claims where plaintiff, alleging both copyright and trade dress claims, failed to allege specific copyrighted works that were infringed); *see also Bespaq Corp. v. Haoshen Trading Co.*, No. C 04-3698 PJH, 2005 WL 14841, at *3 (N.D. Cal. Jan. 3, 2005) (motion to dismiss copyright claim granted where plaintiff alleged infringement of 366 pieces of miniature furniture copyrights but provided only a catalog containing small-scale photographs); *Luvdarts, LLC v. AT&T Mobility, LLC*, 710 F.3d 1068, 1071-73 (9th Cir. 2013) (affirming motion to dismiss for failure to state indirect copyright infringement claim where plaintiff made unfounded factual assertions and conclusory allegations of law). In addition, courts require heightened standards for pleading copyright infringement because such a case "lends itself readily to abusive litigation, since the high cost of trying such a case can force a defendant who might

1 otherwise be successful in trial to settle in order to avoid the time and expenditure of
2 a resource intensive case.” *Dorchen/Martin Assocs., Inc. v. Brook of Cheboygan, Inc.*,
3 838 F. Supp. 2d 607, 611 (E.D. Mich. 2012).

4 Here, the allegations in the Complaint fail to plausibly state a claim for
5 copyright infringement under the heightened pleading standards of *Twombly* and
6 *Iqbal*. Simply stated, the Complaint fails to identify a single copyright application
7 that is purportedly infringed by Michaels or Hobby Lobby. Plaintiff’s allegations,
8 even if taken as true, do not identify which copyright application is purportedly
9 infringed. Rather, Plaintiff cites a litany of unrelated facts and attaches a sheet
10 identifying fifty-one (51) applications in Attachment B, but fails to identify any
11 specific application in the Complaint that is infringed by Michaels or Hobby Lobby.
12 Put differently, there is no allegation in the Complaint of a particular work of any
13 defendant that infringes any particular copyright registration. Even if Plaintiffs
14 supplied Michaels and Hobby Lobby with the corresponding deposit copy of each of
15 the fifty-one (51) underlying work, Defendants would still be at a loss to defend
16 themselves because the claims themselves are completely vague as to which works
17 Michaels or Hobby Lobby allegedly infringes. Such broad allegations are factually
18 deficient in light of *Twombly* and *Iqbal*.

19
20 **c. Plaintiffs’ Complaint fails to identify the protectable elements**
21 **infringed by Michaels or Hobby Lobby.**

22 “To establish copyright infringement, a plaintiff must prove two elements: ‘(1)
23 ownership of a valid copyright, and (2) copying of constituent elements of the work
24 that are original.’” *L.A. Printex Indus., Inc. v. Aeropostale, Inc.*, 676 F.3d 841, 846
25 (9th Cir. 2012) (quoting *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S.
26 340, 361 (1991)). Plaintiffs’ Complaint fails to allege which constituent elements of
27 the work that are original Michaels is infringing.
28

1 Plaintiffs' Complaint generally and conclusory alleges that Crafty Productions,
2 Inc. "has created many original product concepts and designs, including creative,
3 decreative wood products." PLAINTIFFS' COMPLAINT, ¶ 22. In other places, the
4 Complaint merely references "CPI's many original designs and products" or "CPI's
5 original designs and products" or "CPI's knocked off products." *Id.* at ¶ 27, 29, 42,
6 51, and 52-55, 59. Plaintiffs' copyright infringement claim references "Plaintiffs'
7 original designs and products." *Id.* At ¶ 67. Nowhere does the Complaint identify
8 (1) which constituent elements of the work are original to Plaintiffs; or (2) how
9 Michaels or Hobby Lobby are infringing those elements. Without this basic level of
10 factual pleading, Michaels or Hobby Lobby cannot adequately respond to the
11 Complaints' allegations. As such, the Complaint should be dismissed.

12 **e. Plaintiffs Cannot Recover Statutory Damages or Attorneys'**
13 **Fees.**

14 Plaintiffs' Complaint seeks statutory damages and attorneys' fees under its
15 copyright claims. PLAINTIFFS' COMPLAINT, p. 23, ¶ I-J. While the Copyright Act
16 allows for the recovery statutory damages or attorneys' fees in certain cases, the Act
17 requires timely registration. Specifically, Section 412 of Title 17, bars an award of
18 statutory damages or attorneys' fees for "any infringement of copyright commenced
19 after first publication of the work and before the effective date of its registration,
20 unless such registration is made within three months after the first publication of the
21 work." 17 U.S.C § 412 (2008). Section 412 "leaves no room for discretion and
22 clearly mandates that," in order to recover attorneys' fees and statutory damages, the
23 copyright must have been registered before the commencement of infringement,
24 unless registration is made three months after first publication of the work. *City of*
25 *Carlsbad v. Shah*, 850 F. Supp. 2d 1087, 1101 (S.D. Cal. 2012). Here, show above,
26 the owner of the works has not even filed a registration. Further, even assuming that
27 Crafty Productions, Inc.'s registrations are valid, they were not filed within 3 months
28 of first publication. All of the listed works are identified only by a recent application

1 number and no work was identified with a copyright registration number. *See*
2 PLAINTIFFS' COMPLAINT, at Attachment B. (Dkt. 1-2). Of the 51 works, 50 have first
3 publication dates of July 2014 or earlier. None of Crafty Productions, Inc.'s
4 registrations show they were filed within 3 months of the first publication. Thus,
5 section 412 precludes Plaintiffs from collecting statutory damages or attorneys' fees.
6 *Oddo v. Ries*, 743 F.2d 630, 634 (9th Cir. 1984). Thus, Plaintiffs' Complaint should
7 be dismissed.

8 **3. Plaintiffs' Trade Dress Claims Should be Dismissed**

9 In their second and third claims for relief, Plaintiffs assert causes of action for
10 trade dress under section 43(a) of the Lanham Act and California law. PLAINTIFFS'
11 COMPLAINT, at ¶ 71-83. These claims should be dismissed because (1) Plaintiffs fail
12 to identify allege which products are subject to these claims; and (2) Plaintiffs fail to
13 allege which products have acquired protectability.

14 **a Plaintiffs Have Not Identified Their Trade Dress.**

15 Plaintiffs' trade dress claims (counts 2 & 3) should be dismissed because the
16 Complaint fails to identify which products, if any, are the subject of these claims
17 against Michaels and Hobby Lobby. In the body of the complaint, Plaintiffs never
18 mention any trade dress of products with nonfunctional aspects. Instead, in the
19 second claim for relief, Plaintiffs merely assert in conclusory fashion: "Through
20 many years of consistent, creative effort, Plaintiffs have created numerous original
21 designs and products that have proven to be very popular with consumers and
22 successful at retail in the United States, including all of the designs and products
23 depicted in Exhibits A-H. Because of the popularity and success of Plaintiffs' designs
24 and products, the non-functional aspects of Plaintiffs' original designs and products
25 has become distinctive; that is, the appearance of Plaintiffs' original designs indicates
26 to consumers that the source and origin of these products is Plaintiffs, not competitors
27 or others." PLAINTIFFS' COMPLAINT, at ¶ 72. In the third claim, Plaintiffs similarly
28

1 rely upon conclusory pleading: “By the acts alleged herein, each Defendant has
2 violated Plaintiffs’ rights under California law, including under Cal. Bus. & Prof.
3 Code §§ 14330, 17500, and under the common law protections against trade dress
4 infringement and palming off.” *Id.* at ¶ 80. Michaels and Hobby Lobby cannot fairly
5 respond to these trade dress claims and is left guessing what specific products
6 Plaintiffs are asserting. The claims must be dismissed.

7 **b. Plaintiffs Have Not Plead Protectability.**

8 "Trade dress refers generally to the total image, design, and appearance of a
9 product and may include features such as size, shape, color, color combinations,
10 texture or graphics." *Clicks Billiards, Inc. v. Sixshooters, Inc.*, 251 F.3d 1252, 1257
11 (9th Cir. 2001). To prevail on a trade dress infringement claim, the plaintiff must
12 show (1) that its trade dress is protectable and (2) that the defendant's use of a
13 purportedly-similar trade dress is likely to confuse consumers. *Fuddruckers, Inc. v.*
14 *Doc's B.R. Others, Inc.*, 826 F.2d 837, 841 (9th Cir. 1987). For unregistered trade
15 dress, protectability is demonstrated by showing that the trade dress is both (i) non-
16 functional and (ii) performs a source-identifying role, either because the trade dress is
17 inherently distinctive or because it has acquired distinctiveness through secondary
18 meaning among the relevant consuming population. *See Two Pesos, Inc. v. Taco*
19 *Cabana, Inc.*, 505 U.S. 763, 769, (1992) (describing basic requirements for trade
20 dress protection); 15 U.S.C. § 1125 (a)(3) ("In a civil action for trade dress
21 infringement under this chapter for trade dress not registered on the principal register,
22 the person who asserts trade dress protection has the burden of proving that the matter
23 sought to be protected is not functional"). Thus, a plaintiff asserting trade dress
24 infringement must show "(1) that its claimed dress is nonfunctional; (2) that its
25 claimed dress serves a source-identifying role either because it is inherently
26 distinctive or has acquired secondary meaning; and (3) that the defendant's product or
27 service creates a likelihood of consumer confusion." *Clicks Billiards*, 251 F.3d at
28 1258; *Art Attacks Ink, LLC v. MGA Entm't Inc.*, 581 F.3d 1138, 1145 (9th Cir. 2009).

1 Because affording trade dress protection to product designs may hinder legitimate
2 competition, the Ninth Circuit has advised district courts to evaluate such claims with
3 greater scrutiny than claims involving other forms of trade dress. *Leatherman Tool*
4 *Group, Inc. v. Cooper Indus., Inc.*, 199 F.3d 1009, 1012-13 (9th Cir. 1999).

5 First, the trade dress claims fail because Plaintiffs fail to identify nonfunctional
6 aspects of the products. Again, Plaintiffs merely assert in conclusory fashion:
7 “Because of the popularity and success of Plaintiffs’ designs and products, the non-
8 functional aspects of Plaintiffs’ original designs and products has become distinctive;
9By the acts alleged herein, each Defendant has violated Plaintiffs’ rights under
10 California law, including under Cal. Bus. & Prof. Code §§ 14330³, 17500⁴, and under
11 the common law protections against trade dress infringement and palming off.”
12 PLAINTIFFS’ COMPLAINT, at ¶ 73, 80. Plaintiff pleads no facts supporting these
13 conclusory statements, and therefore have not adequately pleaded that the trade dress
14 is nonfunctional. *Two Pesos, Inc.*, 505 U.S. at 769

15 Second, the trade dress claims fail because Plaintiffs fail to plead facts showing
16 the works serve as a source-identifier. Nowhere do Plaintiffs plead facts showing
17 how any trade dress is inherently distinctive or how it has acquired secondary
18 meaning. Rather, Plaintiffs merely rely upon conclusory pleading: “Because of the
19 popularity and success of Plaintiffs’ designs and products, the non-functional aspects

20 _____
21 ³ Section 14330 was repealed, effective January 1, 2008. See A.B. 1484, Reg. Sess. (Cal.
22 2007). Plaintiffs’ third claim should be dismissed to the extent it relies on section 14330. *Emeco*
23 *Indus., Inc. v. Restoration Hardware, Inc.*, No. C-12-5072, 2012 WL 6087329, at *3 (N.D. Cal.
Dec. 6, 2012) (granting motion to dismiss because claim was based on Cal. Bus. & Prof. Code §§
14330 et seq., which has been repealed).

24 ⁴ Section 17500, California’s False Advertising Law, prohibits any statement in connection
25 with the sale of goods “which is untrue or misleading, and which is known, or which by the exercise
26 of reasonable care should be known, to be untrue or misleading.” CAL. BUS. & PROF. CODE §
27 17500. Plaintiffs have not alleged a plausible claim under California’s False Advertising law
28 because they have not made any assertions whatsoever concerning any statements Michaels made
that may be untrue or misleading. They have not even made any conclusory allegations as to the
elements of a claim for false advertising under section 17500. PLAINTIFFS’ COMPLAINT, at ¶¶ 79-83.
Thus, to the extent Plaintiffs’ third claim is based on section 17500, it should be dismissed.
Cortina, 2015 WL 1411336, at *13.

1 of Plaintiffs' original designs and products has become distinctive; that is, the
2 appearance of Plaintiffs' original designs indicates to consumers that the source and
3 origin of these products is Plaintiffs, not competitors or others....By the acts alleged
4 herein, each Defendant has violated Plaintiffs' rights under California law, including
5 under Cal. Bus. & Prof. Code §§ 14330, 17500, and under the common law
6 protections against trade dress infringement and palming off." PLAINTIFFS'
7 COMPLAINT, at ¶ 72, 80. Plaintiffs plead no facts supporting these conclusory
8 allegations and, therefore, have not adequately pleaded that any trade dress serves as
9 a source identifier. *Two Pesos, Inc.*, 505 U.S. at 769.

10 **c. Plaintiffs Have Not Plead When Their Products Acquired**
11 **Secondary Meaning.**

12 To establish a claim for trade dress infringement based on a product design, the
13 plaintiff must show that its design has attained secondary or "acquired" meaning.
14 *Wal-Mart Stores, Inc. v. Samara Bros, Inc.*, 529 U.S. 205, 212 (2000). Secondary
15 meaning exists when, "in the minds of the public, the primary significance of a
16 [design] is to identify the source of the product rather than the product itself." *Id.* at
17 211 (*quoting Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844, 851 (1982)). "The
18 test of secondary meaning is the effectiveness of the effort to create it, and the chief
19 inquiry is directed towards the consumer's attitude about the mark in question: does it
20 denote to him a single thing coming from a single source?" *Carter-Wallace, Inc. v.*
21 *P&G Co.*, 434 F.2d 794, 802 (9th Cir. 1970) (internal quotation omitted). The
22 plaintiff bears the burden of showing its mark or design obtained secondary meaning
23 before the defendant commenced its allegedly infringing activities. *Levi Strauss &*
24 *Co. v. Blue Bell, Inc.*, 778 F.2d 1352, 1358 (9th Cir. 1985) (en banc); *Braun, Inc. v.*
25 *Dynamics Corp. of Am.*, 975 F.2d 815, 826 (Fed. Cir. 1992) ("A claim of trade dress
26 infringement fails if secondary meaning did not exist before the infringement
27 began.").

1 Here, the Plaintiffs have plead no facts showing (1) when the alleged trade
2 dress (whatever it is) obtained secondary meaning or (2) that the alleged trade dress
3 obtained secondary meaning before Michaels or Hobby Lobby commenced any
4 allegedly infringing activities. PLAINTIFFS' COMPLAINT, at ¶ 73, 80. Absent this
5 showing, the Plaintiffs have not adequately plead a valid claim for trade dress
6 infringement.

7 **4. Plaintiffs' State Law Claims are Preempted by the Copyright Act.**

8 Section 301 of the Copyright Act of 1976 explains the extent that the Act
9 preempts state law causes of action and provides, in relevant part:

10 (a) On and after January 1, 1978, all legal or equitable rights that are
11 equivalent to any of the exclusive rights within the general scope of
12 copyright as specified by section 106 in works of authorship that are
13 fixed in a tangible medium of expression and come within the subject
14 matter of copyright as specified by section 102 and section 103...are
15 governed exclusively by this title. Thereafter, no person is entitled to
any such right or equivalent right in any such work under the common
law or statutes of any State.

16 17 U.S.C. § 301(a) (1998). Pursuant to § 301(a), preemption exists if: (1) the state
17 right is "within the subject matter of copyright" as defined by the Act, and (2) the
18 state right is "equivalent" to any exclusive rights of a federal copyright. *Motown*
19 *Record Corp. v. George A. Hormel & Co.*, 657 F. Supp. 1236, 1239 (C.D. Cal. 1987).
20 Congress has explained that "[t]he intention of section 301 is to preempt and abolish
21 any rights under the common law or statutes of a State that are equivalent to
22 copyright and that extend to works, within the scope of the Federal copyright." H.R.
23 Rep. No. 94-1476, at 130 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5746.

24 **a. Plaintiffs' Intentional Interference with Prospective Economic**
25 **Advantage Claim is Preempted.**

26 Plaintiffs' fourth cause of action asserts a claim for intentional interference
27 with prospective economic advantage. PLAINTIFFS' COMPLAINT, at ¶¶ 84-88. A
28

1 claim for interference with prospective relationships is preempted if it alleges rights
2 equivalent to those protected by copyright. *Miller v. Miramax Film Corp.*, No. CV
3 99-08526, 1999 U.S. Dist. LEXIS 23422, at *13 (C.D. Cal. Nov. 22, 1999). Claims
4 for intentional interference with prospective economic advantage are preempted by
5 the Copyright Act where the claims merely: (1) restate the conduct upon which the
6 plaintiffs' copyright claims were based and (2) allege lost business resulting from the
7 purported acts of infringement. *Idema v. Dreamworks*, 162 F. Supp. 2d 1129, 1193
8 (C.D. Cal. 2011).

9 Here, Plaintiffs' interference claim is nothing more than a restatement of the
10 copyright claim. Specifically, Plaintiffs' interference claim alleges that Michaels and
11 Hobby Lobby intentionally interfered with Plaintiffs' existing and prospective
12 customers through the acts of "manufacturing, distributing and/or selling Plaintiffs'
13 original and/or substantially similar designs or products without authorization from
14 Plaintiffs." PLAINTIFFS' COMPLAINT, at ¶ 86. Plaintiffs allege all the "designs or
15 products" are copyrighted. *Id.* at ¶¶ 5, 22, 66-70. Further, "manufacturing,
16 distributing and/or selling" copyrighted works are within the list of exclusive rights
17 afforded copyright owners. 17 U.S.C. § 106(1)-(2). Therefore, Plaintiffs' claim for
18 intentional interference with prospective economic advantage is preempted. *Worth*, 5
19 F. Supp. 2d at 822; *Motown Record Corp.*, 657 F. Supp. at 1240.

20 **ii. Plaintiffs' Unfair Competition is Preempted.**

21 Plaintiffs' fifth cause of action asserts a claim for unfair competition against
22 Michaels and Hobby Lobby under California Business and Professions Code §
23 17200. PLAINTIFFS' COMPLAINT, at ¶¶ 89-92. Unfair competition law in California
24 prohibits any "unlawful, unfair or fraudulent business practice." *Barquis v.*
25 *Merchants Coll. Assn.*, 496 P.2d 817 (Cal. 1972). An examination of the Complaint's
26 allegations show that the rights Plaintiffs are seeking to enforce are rights granted by
27 the Copyright Act.
28

Here, the Complaint merely incorporates by reference the proceedings paragraphs and then states, “[b]y its acts above constituting intentional interference with prospective economic advantage, each Defendant has employed unlawful and unfair business acts or practices, in violation of Cal. Bus. & Prof. Code § 17200 et seq.” PLAINTIFFS’ COMPLAINT at ¶ 90. All of the preceding acts involve allegations of manufacturing, distributing and/or selling the alleged copyrighted works. *Id.* at ¶¶ 5, 22, 57-60, 66-70. Because the Copyright Act grants rights “to reproduce the copyrighted work in copies,” “to prepare derivative works based upon the copyrighted work,” “to distribute copies . . . to the public,” and “to display the copyrighted work publicly,” 17 U.S.C. § 106, *Del Madera Props. v. Rhodes & Gardner, Inc.*, 820 F.2d 973, 977 (9th Cir. 1987) (overruled on other grounds), it is clear that Plaintiffs’ unfair competition claim is based solely on rights equivalent to those protected by the federal copyright laws and, therefore, are preempted. *Kodadek v. MTV Networks, Inc.*, 152 F.3d 1209, 1212 (9th Cir. 1998) (holding that California unfair competition claims are preempted by the Copyright Act), *Experexchange, Inc. v. Doculex, Inc.*, 2009 WL 3837275, at *24 (N.D. Cal. Nov. 16, 2009) (same); *Capcom Co., Ltd. v. MKR Group, Inc.*, 2008 U.S. Dist. LEXIS 83836, 2008 WL 4661479, at *15 n.10 (N.D. Cal. Oct. 20, 2008) (same); *Capcom Co., Ltd. v. MKR Group, Inc.*, 2008 U.S. Dist. LEXIS 83836 (N.D. Cal., Oct. 10, 2008) (holding that claim for unfair business practices under Cal. Bus. & Prof. Code §§ 17200 is preempted); *see also Motown Record Corp. v. George A. Hormel & Co.*, 657 F. Supp. 1236, 1239-40 (C.D. Cal. 1987) (holding plaintiffs’ unfair competition claim was preempted because it was not “qualitatively different” from their copyright claim).

5. Plaintiffs’ Intentional Interference Claim Must Be Dismissed As Michaels and Hobby Lobby Cannot Interfere with Themselves.

Plaintiffs claim that they are the creators of many original product concepts and designs, including many creative, decorative wood products. PLAINTIFFS’ COMPLAINT, at ¶ 22. Plaintiffs claim to manufacture these products in China and then

1 sell them to their customers (retailers like Michaels and Hobby Lobby), either
2 directly or through a sales representative. *Id.* at ¶¶ 24-25, 35, 44-46, & 57-62.
3 Plaintiffs do not claim that Michaels or Hobby Lobby are manufacturing the products
4 or selling them to other retailers. Rather, the Complaint alleges, in a conclusory
5 manner, that “Michaels was buying very little from CPI” and the products it was
6 buying from others are alleged infringements. *Id.* at 57, 66-70. For Hobby Lobby,
7 Plaintiffs allege, conclusory, that “Hobby Lobby requested the actual samples of 26
8 of the 50 products for Christmas and approximately the same amount for Fall and
9 Halloween. Ultimately, CPI asked for the samples back, but the Hobby Lobby buyer
10 Jessica Haynes claimed she did not have them anymore. On information and belief,
11 Faherty undercut CPI with Hobby Lobby like she did with Bill at A.C. Moore. In
12 fact, Faherty admitted that she worked with Hobby Lobby each season to show them
13 CPI’s original wood products, so that they could adapt or derive a slightly different
14 design in an attempt to call it their “own” product.” *Id.* at ¶ 62.

15 First, to the extent Plaintiffs’ claim is based on the business relationship
16 between Michaels or Hobby Lobby and Plaintiffs, the claim fails because Michaels
17 and Hobby Lobby cannot interfere with their own business relationships. California
18 law has long recognized that the core of this tort is interference with an economic
19 relationship by a *stranger* to that relationship. *Marin Tug & Barge, Inc. v. Wesport*
20 *Petroleum, Inc.*, 271 F.3d 825, 832 (9th Cir. 2001). As a result, an entity with a
21 direct interest or involvement in that relationship is not liable for harm caused by
22 pursuit of its interests. *Id.*

23 Second, to the extent that Plaintiffs are alleging Michaels and Hobby Lobby
24 interfered with *other* relationships, Plaintiffs fail to allege any factual support at all.
25 The elements of intentional interference with prospective economic advantage in
26 California are: (1) an economic relationship between the plaintiff and some third
27 party, with the probability of future economic benefit to the plaintiff, (2) the
28 defendant’s knowledge of the relationship, (3) intentional acts on the part of the

1 defendant designed to disrupt the relationship, (4) actual disruption of the
2 relationship, and (5) economic harm to the plaintiff proximately caused by the acts of
3 the defendant. *Korea Supply Co. v. Lockheed Martin Corp*, 63 P.3d 937, 950 (Cal.
4 2003). Michaels and Hobby Lobby have no indication as to what “existing and
5 prospective customer relationships” Plaintiffs are referring. Plaintiffs have not even
6 alleged facts to make it past the first element, as Plaintiffs have not identified any
7 “third party.” *Blank v. Kirwan*, 703 P.2d 58 (Cal. 1985) (finding that complaint
8 failed to state a claim for intentional interference with prospective economic
9 advantage because the requisite relationship with third persons involved as yet
10 unknown or nonexistent patrons). Without identifying any specific sales or specific
11 relationships that Michaels and Hobby Lobby have allegedly interfered with,
12 Plaintiffs are impermissibly alleging that Michaels and Hobby Lobby interfered with
13 the market in general. *See e.g., Westside Center Assocs. v. Safeway Stores 23, Inc.*,
14 49 Cal. Rptr. 2d 793, 804 (Cal. Ct. App. 1996) (finding that without an existing
15 relationship with an identifiable buyer, plaintiff’s expectation of a future sale was
16 nothing more than a hope for an economic relationship and could not serve as basis
17 for interference with prospective economic advantage claim). In other words, a
18 defendant must have interfered with a specific existing relationship, not simply with
19 the formation of one in the future. *See Rickards v. Canine Eye Reg. Found., Inc.*, 704
20 F.2d 1449, 1456, (9th Cir. 1983). For these reasons, Plaintiffs’ interference claim
21 must be dismissed.

22 **B. Michaels and Hobby Lobby Requests a More Definite Statement for Any**
23 **Claims That This Court Declines to Dismiss.**

24 If Plaintiffs’ Complaint is not dismissed in its entirety, Michaels and request
25 that Plaintiffs be ordered to provide a more definite statement of their claims. Federal
26 Rule of Civil Procedure 12(e) states that “if a pleading...is so vague and ambiguous
27 that a party cannot reasonably be required to frame a responsive pleading, the party
28 may move for a more definite statement.” FED. R. CIV. P. 12(e). Although generally

1 disfavored, such relief is appropriate where, as here, the complaint is so indefinite
2 that the defendant cannot ascertain the nature of the claim being asserted. *Fractional*
3 *Villas, Inc. v. Tahoe Clubhouse*, 2009 U.S. Dist. LEXIS 4194, No. 08cv1396, at *5
4 (C.D. Cal. Jan. 22, 2009).

5 Despite the length of the complaint, Plaintiffs did not make any effort to
6 identify the precise allegations upon which each claim is based. Allegations of fact
7 that may be relevant to only one defendant or only one claim are nevertheless made
8 part of each cause of action against each defendant. As a result, Michaels and Hobby
9 Lobby are left with a confusing mass of allegations to unscramble in an effort to
10 make sense of Plaintiffs' disjointed claims. Given the number and diversity of named
11 defendants and the breadth of the allegations, claims vaguely referring to
12 "defendants" should not suffice. *See McHenry v. Renne*, 84 F.3d 1172, 1175 (9th Cir.
13 1996).

14 In addition, Michaels and Hobby Lobby cannot frame a responsive pleading
15 without, at the very least, knowing which of the various copyrights Michaels and
16 Hobby Lobby specifically have allegedly infringed upon. *Boxall v. Sequoia Union*
17 *High School Dist.*, 464 F. Supp. 1104, 1114 (N.D. Cal. 1979). Therefore, this Court
18 should require Plaintiffs to identify which copyrights pertain to the claims against
19 each defendant specifically. *McHenry v. Renne*, 84 F.3d 1172, 1179 (9th Cir. 1996)
20 (more definite statement warranted when complaint failed to indicate which wrongs
21 were committed by which defendants). Accordingly, if the Complaint is not
22 dismissed in its entirety, Plaintiffs should be required to file a more definite statement
23 of their claims.

24 IV. CONCLUSION

25
26 For the reasons set forth above, Michaels and Hobby Lobby respectfully
27 requests this Court to grant this Motion to Dismiss Plaintiffs' complaint in its
28

entirety. Alternatively, Michaels and Hobby Lobby requests this Court require a more definite statement for any claims it declines to dismiss.

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CERTIFICATE OF SERVICE

I hereby certify that on the below date, I filed the foregoing document via the Court's CM/ECF Filing System, which will serve electronic notice of the same on the following:

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